Lim Thian Kiat v Teresa Haesook Lim & Anor

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S5-33-477 OF 1997
JAMES FOONG J
20 DECEMBER 1997

Family Law *— Divorce — Deed of separation — Whether deed could be referred to court as to its reasonableness — Whether there was in existence rules of court having been promulgated to enable such agreement to be referred to the court for its comment — Whether court has jurisdiction to comment on the reasonableness of the agreement, and to give such directions, if any, in the matter as it thinks fit — Law Reform (Marriage and Divorce) Act 1976 s 56 — Rules of the High Court 1980 O 33 r 2*

Family Law *— Matrimonial property — Division of property — Whether court has power to vary terms of deed of separation made by the parties — Whether court should adopt the terms relating to distribution of matrimonial assets as stated in the deed — Whether deed has been rescinded — Whether there was a collateral agreement between the parties existing with the deed pertaining to the division of the matrimonial properties — Law Reform (Marriage and Divorce) Act 1976 ss 84 and 97*

The petitioner had filed a divorce petition against his wife, the respondent. The latter subsequently filed a cross-petition for divorce and claimed half of the petitioner's assets acquired during the marriage. The petitioner and the respondent had earlier entered into a deed of separation on 14 February 1991, which spells out, inter alia, that the respondent accepts the settlement of US$500,000 in full and final settlement of her separation and all claims of matrimonial assets against the husband in the event of a divorce. Counsel for the petitioner argued that s 56 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') provides for such agreement to be referred to the court to express an opinion as to the reasonableness of the agreement, and to give such directions, if any, in the matter as it thinks fit. Counsel for the respondent, though accepting that there was this deed of separation, challenged the existence of any rules of court having been promulgated to enable such agreement to be referred to the court for its comment.

The respondent also contended that the deed of separation had been rescinded by her solicitors on 12 September 1991 in writing. This, she alleged, was caused by the petitioner's breach of several clauses of the deed of separation. The issues before the court were: (i) the deed of separation was valid; (ii) there was a collateral agreement between the parties existing with the deed of separation as the respondent claimed that the petitioner had agreed to pay her more than what was stipulated in the deed of separation; and (iii) ss 84 and 97 of the Act gave the court power to vary the agreement between the petitioner and the respondent.

Held, declaring that the deed of separation remained subsisting and valid between both parties:

(1) The prearrangement 'provisions may be made by rules of court' is not confined only to the rules and regulations as set out in the Divorce and Matrimonial Proceedings Rules 1980. The 'rules of court' must surely include the Rules of the High Court 1980 ('the RHC') which governs all proceedings brought in the High Court, unless otherwise provided. There is no exclusion of the RHC in the Act or other legislation relating to divorce proceedings within the jurisdiction of this court. For this, the reference to 'provisions may be made by rules of court' must include those provided in the RHC if they are not disclosed in the Divorce and Matrimonial Proceedings Rules 1980. Further, O 33 r 2 of the RHC renders sufficient jurisdiction to enable the parties in a matrimonial dispute to refer to the court any agreement or arrangement they have entered for consideration as provided under s 56 of the Act. This court shall therefore have sufficient authority to entertain this application (see pp 109F–I and 110A).

(2) On the facts, there was no reasonable cause for the respondent to rescind the agreement. Therefore, the purported rescission of the deed of separation was unlawful and ineffective, and the agreement would remain subsisting (see pp 111E and 112E).

(3) Both ss 84 and 97 of the Act deal exclusively with maintenance for spouses and children. It does not include the division of matrimonial assets, which comes under s 76 of the Act. However, by virtue of the clause, 'This deed is always subject to the approval of the court upon divorce', though there is no necessity for the court's approval on the agreed provision for division of matrimonial assets, the entire agreement, with all its terms, reverts back to the court's jurisdiction for sanction.

To decide what weight should be given, in order to reach a just result where there is a prior agreement, as in this case, regard must be had to the conduct of both parties leading up to the prior agreement, and to their subsequent conduct in consequence of it. The circumstances surrounding the making of the agreement would be relevant. Important too is the general proposition that formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of the agreement. In this case, based on the facts, the court would be minded to adopt the terms relating to distribution of matrimonial assets stated in the deed of separation, as it was a perfectly valid agreement between two parties where the terms were arrived at voluntarily, with the advantage of the respondent possessing adequate legal advice. Further, the terms were performed by the petitioner and the respondent had, for the last seven years, quite comfortably and without much complaint, accepted and lived by the terms stated in the deed of separation (see pp 113B, G–H, 114B–D, I and 115A–B); *Edgar v Edgar* [1980] 3 All ER 887 followed.

(4) The respondent attempted to introduce extrinsic evidence to vary or contradict the terms of the written deed of separation, namely the clause concerning the full and final settlement of the respondent's claim of matrimonial assets. As no parol evidence is admissible under ss 91 and 92 of the Evidence Act 1950, this principle of collateral agreement introduced by common law is now intended to circumvent this statutory provision. The amount which the petitioner was supposed to pay the respondent was not agreed upon in the purported collateral agreement. This cast a doubt as to whether there was genuinely such a promise made by the petitioner to pay a greater sum than what was stated in the deed of separation. The allegation of a collateral agreement was probably an afterthought designed to overcome the bargain the respondent had struck freely and voluntarily with the petitioner (see pp 115E–F, I and 116A–C).

[Bahasa Malaysia summary

Pempetisyen telah memfailkan satu petisyen perceraian terhadap isterinya, iaitu penentang. Penentang kemudiannya memfailkan petisyen balas untuk perceraian dan menuntut setengah daripada aset pempetisyen yang diperolehi semasa perkahwinan. Pempetisyen dan penentang terlebih dahulu telah mengikat suratikatan pemisahan pada 14 Februari 1991, yang menyatakan, antara lain, bahawa penentang menerima penyelesaian US$500,000 sepenuhnya dan penyelesaian muktamad pemisahannya serta semua tuntutan aset suami isteri terhadap suami sekiranya mereka bercerai. Peguam pempetisyen menghujahkan bahawa s 56 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut') memperuntukkan perjanjian demikian dirujuk kepada mahkamah untuk menyatakan suatu pendapat mengenai kemunasabahan perjanjian itu, dan untuk memberikan apa-apa arahan, jika ada, dalam perkara itu sebagaimana difikirkannya wajar. Peguam penentang, walaupun menerima bahawa terdapat suratikatan pemisahan ini, mencabar kewujudan mana-mana kaedah mahkamah yang telah diisytiharkan bagi membolehkan perjanjian demikian dirujuk kepada mahkamah untuk ulasannya.

Penentang juga berhujah bahawa suratikatan pemisahan telah dibatalkan oleh peguamcaranya pada 12 September 1991 secara bertulis. Dia mengatakan ini disebabkan oleh kemungkiran beberapa fasal suratikatan pemisahan oleh pempetisyen. Isu-isu di hadapan mahkamah adalah sama ada: (i) suratikatan pemisahan adalah sah; (ii) terdapat perjanjian kolateral di antara pihak-pihak yang wujud dengan suratikatan pemisahan kerana penentang menuntut bahawa pempetisyen telah bersetuju untuk membayarnya melebihi apa yang disyaratkan dalam suratikatan pemisahan; dan (iii) ss 84 dan 97 Akta tersebut memberikan mahkamah kuasa untuk mengubah perjanjian tersebut di antara pempetisyen dan penentang.

Diputuskan, mengisytiharkan bahawa suratikatan pemisahan tetap kekal dan sah di antara dua-dua pihak:

(1) Syarat 'peruntukan-peruntukan boleh dibuat oleh kaedah-kaedah mahkamah' adalah tidak terhad kepada kaedah-kaedah dan peraturan-peraturan seperti yang dinyatakan dalam Kaedah-Kaedah Prosiding Perceraian dan Perkahwinan 1980. 'Kaedah-kaedah mahkamah' tentunya mesti termasuk Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') yang menguasai semua prosiding yang dibawa di Mahkamah Tinggi, melainkan diperuntukkan sebaliknya. Tiada pengecualian KMT dalam Akta tersebut atau perundangan lain berkaitan dengan prosiding perceraian dalam bidang kuasa mahkamah ini. Untuk ini, rujukan kepada 'peruntukan-peruntukan boleh dibuat oleh kaedah-kaedah mahkamah' mestilah termasuk apa yang diperuntukkan dalam KMT sekiranya tidak didedahkan dalam Kaedah-Kaedah Prosiding Perceraian dan Perkahwinan 1980. Seterusnya, A 33 k 2 KMT memberikan bidang kuasa yang mencukupi bagi membolehkan pihak-pihak dalam pertikaian perkahwinan untuk merujuk kepada mahkamah sebarang perjanjian atau susunan mereka telah mengikat untuk balasan seperti yang diperuntukkan di bawah s 56 Akta tersebut. Dengan itu, mahkamah ini hendaklah mempunyai kuasa yang mencukupi untuk melayan permohonan ini (lihat ms 109F–I dan 110A).

(2) Atas fakta-fakta, tiada kausa yang munasabah untuk penentang membatalkan perjanjian tersebut. Maka, pembatalan suratikatan pemisahan yang diandaikan adalah tidak sah dan tidak berkesan, dan perjanjian tersebut akan tetap kekal (lihat ms 111E dan 112E).

(3) Kedua-dua ss 84 dan 97 Akta berkaitan secara eksklusif dengan penyenggaraan untuk suami atau isteri dan anak-anak. Ia tidak termasuk pembahagian aset suami isteri, yang dirangkumi s 76 Akta tersebut. Namun demikian, disebabkan fasal, 'Suratikatan ini sentiasanya tertakluk kepada kelulusan mahkamah pada perceraian', walaupun tiada keperluan untuk kelulusan mahkamah atas peruntukan pembahagian aset suami isteri yang dipersetujui, keseluruhan perjanjian, dengan segala termanya, kembali kepada bidang kuasa mahkamah untuk sanksi.

Untuk memutuskan apakah kepentingan yang harus diberikan, demi mencapai keputusan yang adil di mana terdapat perjanjian terdahulu, seperti dalam kes ini, perhatian mesti ditumpu kepada kelakuan kedua-dua pihak yang membawa kepada perjanjian terdahulu, dan kepada kelakuan yang berikut akibatnya. Keadaan-keadaan mengelilingi pembuatan perjanjian itu adalah relevan. Apa yang penting juga adalah saranan umum bahawa, perjanjian rasmi, yang dicapai secara betul dan adil dengan nasihat guaman yang kompeten, tidak patut digantikan melainkan terdapat alasan yang baik dan kukuh dalam menyimpulkan bahawa ketidakadilan akan disebabkan sekiranya pihak-pihak diikat oleh terma perjanjian. Dalam kes ini, berdasarkan fakta-fakta, mahkamah haruslah menerimapakai terma berhubung dengan pembahagian aset suami isteri yang dinyatakan dalam suratikatan pemisahan,

kerana ia adalah perjanjian sah yang sempurna di antara dua pihak di mana terma dicapai secara sukarela, dengan kelebihan penentang memiliki nasihat guaman yang memadai. Selanjutnya, terma dilaksanakan oleh pempetisyen dan penentang telah, selama tujuh tahun yang lepas, menerima dan mematuhi terma yang dinyatakan dalam suratikatan pemisahan tanpa terlalu banyak aduan (lihat ms 113B, G–H, 114B–D, I dan 115A–B); *Edgar v Edgar* [1980] 3 All ER 887 diikut.

(4) Penentang cuba memperkenalkan keterangan ekstrinsik untuk mengubah atau menyangkal terma suratikatan pemisahan bertulis, iaitu fasal mengenai penyelesaian penuh dan muktamad tuntutan penentang atas aset suami isteri. Oleh kerana tiada keterangan parol boleh diterima di bawah ss 91 dan 92 Akta Keterangan 1950, prinsip perjanjian kolateral ini yang diperkenalkan oleh common law kini bertujuan memintasi peruntukan statutori ini. Amaun yang sepatutnya dibayar oleh pempetisyen kepada penentang tidak dipersetujui dalam perjanjian kolateral yang diandaikan. Ini menimbulkan keraguan mengenai sama ada benar-benar terdapatnya janji sedemikian yang dibuat oleh pempetisyen untuk membayar jumlah yang lebih banyak daripada apa yang dinyatakan dalam suratikatan pemisahan. Pengataan perjanjian kolateral mungkin adalah tambahan yang direkabentuk bagi mengatasi persetujuan yang penentang telah membuat secara bebas dan sukarela dengan pempetisyen (lihat ms 115E–F, I dan 116A–C).]

Notes

For cases on division of property, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2133–2157.

Cases referred to

Alghussein Establishment v Eton College [1988] 1 WLR 587 (refd)
Clark v Clarke (1885) 10 PD 188 (refd)
Edgar v Edgar [1980] 3 All ER 887 (folld)
Tan Swee Hoe Co Ltd v Ali Hussain Bros [1980] 2 MLJ 16 (refd)

Legislation referred to

Divorce and Matrimonial Proceedings Rules 1980
Evidence Act 1950 ss 91, 92
Law Reform (Marriage and Divorce) Act 1976 ss 52, 56, 58, 76, 80, 84, 97
Rules of the High Court 1980 O 33 r 2

Balwant Singh Sidhu (*PS Gill* with him) (*Gill & Tang*) for the petitioner and the co-respondent.

Liew Chun Wah (*MS Murthi* with him) (*Murthi & Partners*) for the respondent.

James Foong J:

Background

The petitioner has filed a divorce petition against his wife, the respondent. This is encl 1. The wife answered with a cross-petition for divorce, and claims:

(a) half of the petitioner's assets acquired during the marriage;

(b) US$100,000 per month tax free for her life until she remarries;

(c) guardianship, custody and control of the three children of the marriage;

(d) maintenance for the children at US$50,000 per month with 5% annual increment;

(e) a trust fund to be set up by the petitioner for the children at US$100m for each child; and

(f) extra tuition fees, medical fees and any incidental fees pertaining to the education of the children.

A party cited was also named and against her, she (the wife) claims damages of US$500m, and be condemned in costs.

The pleadings closed with the petitioner tendering a reply and answer to cross-petition together with an answer of the party cited. Subsequent to the filing of directions for trial, this court fixed the hearing of this petition and cross-petition on 5 December 1997.

While awaiting trial, on 5 September 1997, the petitioner filed a summons-in-chambers to restrain the respondent from molesting, harassing, pestering or disturbing him and his children. This is in encl 11. The return date for this application was 4 December 1997.

Not long thereafter, on 27 November 1997, the respondent by way of summons-in-chambers requested from this court:

(a) maintenance pending suit of US$100,000 per month from November 1993; and

(b) child support of US$40,000 per month for the three children with immediate effect. This application is encl 21. The return date for the summons-in-chambers was 4 December 1997.

On 4 December 1997, the date fixed for hearing of encls 11 and 21, the parties attempted to settle the matters. Unfortunately, it failed. Due to time constraints, I ordered that encls 11 and 21 be heard on the following day, 5 December 1997, together with the petition and cross-petition.

On the morning of 5 December 1997, Mr Balwant Singh Sidhu, counsel for the petitioner and party cited informed this court that he had just filed an application on behalf of the petitioner for the following orders:

(i) that the following question or issue arising in this cause be tried before the trial of the cause and that is 'whether the deed of separation entered into between the parties on 4 February 1991 is valid in law, and subsist'; and

(ii) such further or other orders of directions as to the manner in which the said question or issue shall be stated. A

This application is encl 24 and the return date was 5 December 1997.

Miss Liew, counsel for the respondent, graciously agreed to have this application heard on 5 December 1997 itself, though it was just served on her client. She requested that the affidavits filed by both parties in respect of encls 11 and 21 be used to base her arguments. This was accepted by this court with the consent of Mr Balwant Singh Sidhu. With this, I proceeded to hear submissions relating to encl 24 which should be decided before the petition and cross-petition are heard. The subject matter in encl 24 concerns a deed of separation entered into between the petitioner and the respondent on 14 February 1991. It, inter alia, spells out the following terms: B C

(a) the parties due to unhappy differences agreed mutually to live separate and apart from each other;

(b) the respondent accepts the settlement of US$500,000 in full and final settlement of her separation, and 'subject to the performance of this deed by the husband (the petitioner), the said settlement shall be deemed full and final settlement of all claims of matrimonial assets against the husband in the event of a divorce'; D

(c) the petitioner shall pay to the respondent a sum of US$5,000 per month tax free as her maintenance from the date of this deed with 5% per annum provision for inflation for her life or until she remarries; E

(d) the petitioner shall pay to the respondent a sum of US$8,334 per month tax free being child support for the three children from the date of this deed with 5% per annum provision for inflation; F

(e) the petitioner to pay US$20,000 tax free twice annually as travelling expenses to the respondent and the children, together with first class airfares and hotel bills for four persons. Again there is a 5% per annum provision for inflation;

(f) that in the event that the respondent chooses to live abroad, the petitioner shall purchase a four-door new Mercedes Benz not exceeding US$50,000 for the respondent and the children; G

(g) the respondent covenants not to pledge the credit of the petitioner from the date of this deed;

(h) the respondent shall not directly or indirectly harass, annoy or in any way interfere with the petitioner in all respects; H

(i) the custody, care, control and guardianship of the three children be committed to the respondent with reasonable access to the petitioner;

(j) the petitioner shall within six months from date of this deed create a trust fund for each of the children by making cash deposits with a reputable bank and appointing the bank as trustees to oversee this trust fund; I

(k) upon performance of all these conditions of this deed, the parties agree that 'they shall file a joint petition by consent under s 52 of the

Law Reform (Marriage and Divorce) Act 1976 should any one spouse demands for a divorce'.

According to Mr Balwant Singh Sidhu, s 56 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') provides for such agreement or arrangement to be referred to the court to express an opinion as to the reasonableness of the agreement or arrangement, and to give such directions, if any, in the matter as it thinks fit. It is on this provision that this application (encl 24) is based.

Miss Liew, though accepting that there was this deed of separation, firstly challenged the existence of any rules of court having been promulgated to enable such agreement or arrangement to be referred to the court for its comment.

She contended that as rules are yet to be made under the Divorce and Matrimonial Proceedings Rules 1980 to accommodate this provision, s 56 cannot be relied upon to institute this application.

To facilitate greater understanding and appreciation of her argument, I reproduce below the entire s 56 of the Act:

> *Provisions may be made by rules of court* for enabling the parties to a marriage, or either of them, on application made either before or after the presentation of a petition for divorce, to refer to the court any agreement or arrangement made or proposed to be made between them, being an agreement or arrangement which relates to, arises out of, or is connected with, the proceedings for divorce which are contemplated or, as the case may be, have begun, and for enabling the court to express an opinion, should it think it desirable to do so, as to the reasonableness of the agreement or arrangement and to give such directions, if any, in the matter as it thinks fit. (Emphasis added.)

I am not in agreement with Miss Liew's contention. I am of the view that this prearrangement of the 'provisions may be made by rules of court' is not confined only to the rules and regulations as set out in the Divorce and Matrimonial Proceedings Rules 1980. The 'rules of court' must surely include the principal enactment — the Rules of the High Court 1980 ('the RHC') — which governs all proceedings brought in the High Court, unless otherwise provided. There is no exclusion of the RHC in the said Act or other legislation relating to divorce proceedings within the jurisdiction of this court. For this, the reference to the 'provisions may be made by rules of court' must include those provided in the RHC if they are not disclosed in the Divorce and Matrimonial Proceedings Rules 1980.

In the RHC, O 33 r 2 provides:

> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

This rule should render sufficient jurisdiction to enable the parties in a matrimonial dispute to refer to the court any agreement or arrangement

they have entered for consideration as provided under s 56 of the Act. Armed with this, this court shall have sufficient authority to entertain this application.

Section 80 of the Act — approval by the court

The next argument raised is that such agreement (the deed of separation) is not effective until it has been approved by the court. To support this contention, s 80 of the Act was highlighted. For convenience, I reproduced s 80:

> Compounding of maintenance
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> An agreement for the payment, in money or other property, of a capital sum in settlement of all future claims to maintenance, shall not be effective until it has been approved, or approved subject to conditions, by the court, but when so approved shall be a good defence to any claim for maintenance.

There are certain terms in this deed of separation which relate to the maintenance of the respondent. For this, it requires the approval of the court. But is it not under prayer (iv) of the petition for divorce (encl 1) that the petitioner is seeking this court's approval of this deed of separation? This court has yet to grant its approval, but for the purpose of s 56 of the Act, an opinion can be expressed to the reasonableness of this agreement. Under these circumstances, I fail to understand why this matter is taken as an issue.

Rescission of the deed of separation

The next claim of the respondent is with more substance. She insisted that the deed of separation had been rescinded by her solicitors on 12 September 1991 in writing ('the letter of rescission'). This, she alleged was caused by the petitioner's breach of cll 1(v) and 3(ii) of the deed of separation.

The petitioner vehemently denied this, and asserted that the respondent cannot unilaterally rescind a contract when there was no major wrong committed by him. In addition, the petitioner also claimed that the respondent, by her action, was estopped from terminating this agreement.

Clause 1(v) of the deed of separation

Clause 1(v) of the deed of separation requires the payment by the petitioner of a sum of US$20,000 annually as travelling expenses to the respondent and the children together with four first class tickets and hotel bills. This clause, however, does not spell out the mode and time for payment. In the letter of rescission, the respondent is claiming for a refund by stating that she 'has yet to receive the refund'. To my mind, this reveals an arrangement between the parties whereby the respondent will expend on the holiday expenses first and then claim for disbursement subsequently. The continued credit facilities extended to the respondent by the petitioner on the credit cards seem to support this arrangement. Documentary evidence also revealed that the petitioner had made disbursements on such claims to the respondents. When such was the mode of arrangement at that material

A time, I do not find that the petitioner had breached cl 1(v) of the deed of separation.

Clause 3(ii) of the deed of separation — trust fund for the children

Clause 3(ii) of the deed of separation provides for the creation of a trust
B fund by the petitioner within six months from the deed of separation for each of the children by making cash deposits with a reputable bank, and appointing the bank as trustee to oversee the trust fund.

Perusing a 'management agreement' (p 27 of encl 27) dated 8 August 1991 entered into between the petitioner and the respondent on the one
C part with LIMG, Management and Verwaltungs-Aktiengesellschaft, Vaduz on the other part as trustee, the mechanics for the creation of the children's trust fund had been set in motion. The question that follows is whether any funds were paid to the appointed trustee. The petitioner insisted that he had given to the respondent a sum of US$4m on 3 July 1991 for onward transmission to the trust fund. To this, the respondent had been, and still
D is, evasive of this claim. But one piece of documentary evidence, the confirmation by a Swiss bank (p 1 of encl 27) of this payment made to the respondent is inescapable. Judging by the dates of the appointment of trustees and the payment of this US$4m to the respondent, of which the respondent has not denied receiving for any other purposes, the obligations
E of the petitioner under cl 3(ii) of the deed of separation had been fulfilled, and within the period as stipulated thereunder. This gave no reasonable cause to the respondent to rescind the agreement under this particular provision.

Delay in payment of maintenance

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There was also, in the letter of rescission, a complaint by the respondent of two months' arrears in maintenance payment. But this was never used as a ground to rescind the deed of separation. Item 5 in para 2 of the letter of rescission specifically identifies cl 3(ii) and cl 1(v) as the grounds for rescission. Since this allegation of delay in the tendering of two regular
G monthly maintenance was not made the basis for the rescission, the respondent cannot rely on this alleged breach to claim lawful rescission of the deed of separation.

In any event, even if this was one of the grounds to justify the respondent's claim for rescission, I find that the respondent is estopped
H from doing so. Subsequent to her complaint on this matter, the two months' arrears of maintenance was settled by the petitioner. Thereafter, the respondent continued to accept the monthly maintenance payments for herself and the children, right up to the present day. Substantial parts (from September 1993 to November 1997) of such maintenance payments are displayed at pp 2–3 of encl 27. From the particulars of these documents,
I I noticed that the agreed maintenance was paid for every month. The total amount was no less than US$20,000 per month. This far exceeds what the petitioner was obligated to pay under the deed of separation. In view of such circumstances, the respondent is estopped from claiming that the

petitioner had failed to fulfill his obligation to pay his monthly maintenance, and use this as a basis to rescind the deed of separation — see the case of *Clarke v Clarke* (1885) 10 PD 188.

Still on the issue of the alleged arrears of two monthly maintenance, the petitioner had explained that he refused to pay because of: (a) harassment, annoyance and interference by the respondent; and (b) the respondent's failure to acknowledge receipt of the money given to her for the trust fund. On the first reason, there was in fact an admission by the respondent, through her solicitors, of an intrusion by the respondent into the office of the petitioner when he was holding a business meeting. This act of the respondent contravenes cl 2(ii) of the deed of separation where the respondent covenanted not to 'directly or indirectly harass, annoy or in any way interfere with the husband in all respects'. For the second, as I have stated earlier, there is, to date, no acknowledgement of the sum of US4m given to the respondent for the children's trust fund. For such wrongs, one of which being a term of the deed of separation, the respondent cannot be permitted to take advantage of her own wrong against the petitioner to rescind the agreement — see the case of *Alghussein Establishment v Eton College* [1988] 1 WLR 587.

Finding on whether the rescission was justified

By the reasons stated above, I am of the opinion that the purported rescission of the deed of separation is unlawful and ineffective. The agreement remains subsisting.

Sections 84 and 97 of the Act

The next issue highlights the effects of this deed of separation to ss 84 and 97 of the Act. In Mr Sidhu's submission, he insisted that by the wording of these two sections the court has only power to vary any agreement entered into between the parties in respect of maintenance; no such authority is extended to agreements or arrangements on the division of matrimonial assets. Miss Liew, however, disagreed. She was of the opinion that ss 84 and 97 of the Act are sufficiently extensive to include court's domination, which includes variation, on any agreement and arrangement reached by the parties.

To fully understand the significance of these two sections, I append below their exact wording:

> 84 Power for court to vary agreements for maintenance
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> Subject to section 80, the court may at any time and from time to time vary the terms of any agreement as to maintenance made between husband and wife, whether made before or after the appointed date, where it is satisfied that there has been any material change in the circumstances and notwithstanding any provision to the contrary in any such agreement.
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> 97 Power for court to vary agreement for custody or maintenance
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> The court may at any time and from time to time vary the terms of any agreement relating to the custody or maintenance of a child, whether

A made before or after the appointed date, notwithstanding any provision to the contrary in any such agreement, where it is satisfied that it is reasonable and for the welfare of the child so to do.

From careful perusal of ss 84 and 97 of the Act, I find that the subject matter referred to in these two sections deals exclusively with maintenance, B both for the spouses and the children. It does not include the division of matrimonial assets, which has an entire provision of its own under s 76 of the Act. Neither under this section (s 76) nor pursuant to any other general sections of the Act is prerogative granted to the court to vary such agreement or arrangement in respect of division of matrimonial assets. Even s 80 of the Act comes under the part that governs maintenance of C spouses and refers only to 'maintenance' and not to division of matrimonial assets. Bearing this in mind, I shall now proceed to analyse the deed of separation.

This deed of separation essentially covers five basic matters. The first relates to the parties agreeing to live apart and they both covenant not to D interfere with each other. The second concerns the monthly maintenance of the respondent and the children which includes the creation of trust funds and arrangement of holiday expenses. The availability of transportation and accommodation for the respondent and the children should be under this category. The third involves matrimonial assets. The fourth covers the cessation by the respondent in pledging the husband's E credit with third parties. Finally, there is the provision for the filing of a joint petition for divorce under s 52 of the Act upon performance of all the conditions of the agreement.

It is my opinion that each of the first four items listed above are separable. They can, on their own, stand distinct and separate from the F others. Only the last item requires the fulfillment of all the first four. By this, I am of the view that only the second matter concerning maintenance is subjected to be varied by the court. As for the other three, the court has generally no jurisdiction to vary them as they were voluntarily agreed upon by the parties.

G However, there exists in this deed of separation a cl (v). The parties have agreed to: 'This deed is always subject to the approval of the court upon divorce'. By virtue of this specific provision, though there is no necessity for the court's approval on the agreed provision for division of matrimonial assets, the entire agreement, with all its terms, reverts back to the court's jurisdiction for sanction.

H The item of major contention here is, of course, concentrated on the division of matrimonial assets. By the nature of the cross-petition and the assertion that the petitioner is a billionaire, naturally the respondent would wish to secure for herself a substantial portion of his assets. But the respondent under cl 2(iii) of the deed of separation had accepted I US$500,000 as 'full and final settlement of all her claims of matrimonial assets against the husband (the petitioner) in the event of a divorce'. What then is the effect of this to the current petition for divorce, where the respondent has obviously changed her mind by claiming half of what the

petitioner has? In my view, the principles enunciated by Ormrod LJ in *Edgar v Edgar* [1980] 3 All ER 887 at p 893 should be applicable. It is as follows:

> To decide what weight should be given, in order to reach a just result, to a prior agreement ... regard must be had to the conduct of both parties leading up to the prior agreement, and to their subsequent conduct in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel; all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that, formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of the agreement. There may well be other considerations which affect the justice of this case; the above list is not intended to be an exclusive catalogue.

Applying the factors expounded above, I come up with the following observations:

(1) The deed of separation was, from correspondence tendered, instigated by the respondent.

(2) At all material times prior to the deed of separation, the respondent was represented by solicitors, one of whom, Miss Liew, continues to act as her counsel even at this trial.

(3) The petitioner on the other hand had no solicitors on record. According to the averments in his affidavits, he accepted the terms in the deed of separation as drafted by the respondent's solicitors.

(4) No evidence of undue pressure seems to be applied on the respondent to agree to the terms contained in the deed. The parties wanted to stay apart to relieve their tumultuous relationship with an option for both to file for divorce by consent at a subsequent date.

(5) Necessary financial provisions were made to accommodate the respondent and the children. This obviously justifies and corresponds with the economic and financial position of the parties at that time.

(6) The sum of US$500,000 was paid and acknowledgement of receipt of this was given in writing by the respondent.

(7) The petitioner had fulfilled his part of the obligation under the agreement which was freely entered into by both parties.

With these assessments, I will be minded to adopt the terms relating to distribution of matrimonial assets stated in this deed of separation. It is a perfectly valid agreement between two parties where the terms were arrived at voluntarily, with the advantage of the respondent possessing adequate legal advice. These terms were performed by the petitioner, and I do not

A accept the sudden recent change of heart by the respondent in attempting to vary the terms of the agreement on matrimonial assets, when she had for the last seven years, quite comfortably and without much complaint, accepted and lived by the terms stated in the deed of separation. As for maintenance, for both herself and the children, it will be subjected to review by this court upon consideration of all evidence available.

B

Collateral agreement

Mr Murthi, the respondent's co-counsel, submitted that there was a collateral agreement between the parties existing with the deed of separation. On this, the respondent claimed that the petitioner had agreed to pay her more than what is stipulated in the deed of separation.

C

To substantiate this assertion of the existence of a collateral agreement, the respondent referred to some correspondence between the parties where various offers were alleged as having been made by the petitioner to the respondent to pay the latter a lump sum settlement. Some of these correspondence include unsigned draft agreements. As authority to support this proposition of the validity and enforceability of a collateral agreement, the case of *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16 was cited.

D

After careful perusal of this authority, I am of the view that the respondent is attempting to introduce extrinsic evidence to vary or contradict the terms of the written deed of separation. The primary objective is obviously to vary cl 2(iii) of the deed of separation concerning the full and final settlement of the respondent's claim of matrimonial assets. As no parol evidence is admissible under ss 91 and 92 of the Evidence Act 1950, this principle of collateral agreement introduced by common law is now intended to circumvent this statutory provision. However, before one can consider the implication of this claim to the facts of the present case, it is relevant and necessary to determine the exact scope of this legal principle.

E

F

In my opinion, the following passage of Raja Azlan Shah CJ (Malaya) (as he then was) in *Tan Swee Hoe Co Ltd v Ali Hussain Bros* best expresses and elaborates this point (at p 19):

G

> In our view, those cases are strong authority for the proposition that an oral promise, *given at the time of contracting which induces a party to enter into the contract*, overrides any inconsistent written agreement. This device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement. (Emphasis added.)

H

When this proposition was canvassed, this court enquired from the respondent's counsel as to what amount was agreed upon in this purported collateral agreement. The response was rather surprising; no amount was determined.

I

On reading the affidavit of the respondent (encl 26) and the documents relied upon by the respondent to support this contention of the existence of a collateral agreement, I discovered that they refer to dates well after the deed of separation. They range from 1993 to 1995.

These revelations cast doubts in the mind of this court as to whether there was genuinely such a promise made by the petitioner to pay a greater sum than what is stated in the deed of separation. Even if there were any such promises given, the documentary evidence does not reflect that it was made at the time of the deed of separation to induce the respondent to enter into this contract. Failure to fulfill this fundamental condition disables the application of this principle of collateral agreement. I find that the respondent had entered into the deed of separation well advised, fully aware of the terms therein, and with her eyes wide open. This allegation of a collateral agreement is probably an afterthought designed to overcome the bargain she had struck freely and voluntarily with the petitioner in 1991.

Opinion

From all that I have stated above, I now summarize my opinion as:

(1) the deed of separation is valid and binding on the parties;

(2) this court intends to approve the terms in this deed of separation upon the granting of decree nisi relating to provisions governing the division of matrimonial assets under cl 2(iii); and

(3) as for the provisions in the deed of separation concerning maintenance of the respondent and the children, they are subject to variation by this court as provided for under ss 80, 84 and 97 of the Act.

Costs of this application shall be costs in cause.

Order accordingly.

Reported by David Lai